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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43044
Plaintiff-Respondent,)	
)	Ada Co. Case No.
v.)	CR-2014-3210
)	
JEROME NATHANIEL HARRIS,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE JASON D. SCOTT
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

ERIK R. LEHTINEN
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Jerome Nathaniel Harris appeals from the judgment of the district court entered upon the jury verdict finding him guilty of attempted first degree arson and of being a persistent violator of the law. On appeal Harris argues the jury did not have sufficient evidence upon which to find he is a persistent violator of the law.

Statement of Facts and Course of Proceedings

The state charged Harris with attempted arson in the first degree. (R., pp. 44-45.) With the permission of the district court, the state added a persistent violator enhancement. (R., pp. 64-66.) The jury found Harris guilty of attempted arson in the first degree. (R., p. 117.) During the persistent violator portion of the trial the state introduced, without objection, Exhibits 25, 26 and 27. (12/16/14 Tr., p. 289, L. 16 – p. 290, L. 13.)

These three exhibits detail Harris' prior convictions. Exhibit 25 is a certified copy of Harris' Sentencing Disposition and Notice of Right To Appeal in Kootenai County Case No. CRF 98-05132 dated January 6, 1999. (Ex. 25.) Exhibit 25 shows that Harris was found guilty by a jury of: "Count I – Trafficking In > 28 Grams But < 200 Grams Of Methamphetamine (I.C. § 37-2732B(a)(3)(A))" and "Count II – Delivery Of Methamphetamine (I.C. § 37-2732(a)(1)(A))." (Id. (capitalization altered).) The exhibit includes the information that Harris was sentenced to 5 years with 3 years fixed on Count I, and 5 years with 3 years fixed on Count II. (Id.) According to Exhibit 25, Harris

was committed to the custody of the Idaho State Board of Correction for these convictions. (Id.) Exhibit 26 is a certified copy of the Amended Information in the same case, Kootenai County Case No. CRF 98-05132. (Ex. 26.) The Amended Information alleged Harris committed Count I on or about June 24, 1998, and committed Count II on or about May 28, 1998. (Id.)

Exhibit 27 is a certified copy of Harris' Judgment of Conviction in Ada County Case No. H0600851 dated September 5, 2006. (Ex. 27.) Exhibit 27 shows that Harris pled guilty to the crime of possession of a controlled substance, "a felony under Idaho Code § 37-2732(c)." (Id.) The district court sentenced Harris to 7 years with 1 year fixed, but retained jurisdiction for 180 days. (Id.)

Based upon these exhibits, the jury found Harris was a persistent violator of the law. (See 12/16/14 Tr., p. p. 285, L. 18 – p. 296, L. 9; R., p. 118.) The district court sentenced Harris to 17 years with 5 years fixed. (R., pp. 124-127.) Harris timely appealed. (R., pp. 131-133.)

ISSUE

Harris states the issue on appeal as:

Did the State offer sufficient evidence that Mr. Harris was previously convicted of two felonies, so as to support its finding that he is a “persistent violator of law” within the meaning of I.C. § 19-2514?

(Appellant’s brief, p. 5.)

The state rephrases the issue as:

Did the state present substantial competent evidence upon which a reasonable trier of fact could have found that Harris is a persistent violator of the law?

ARGUMENT

Harris Has Failed To Show The Jury's Finding That He Is A Persistent Violator Should Be Overturned On Appeal

A. Introduction

Harris argues the state failed to present sufficient evidence to support the jury's persistent violator finding because Exhibits 25 and 26 did not use the word "felony" to describe Harris' convictions for trafficking in methamphetamine and delivery of methamphetamine. (Appellant's brief, pp. 7-9.) Harris concedes that Exhibit 27, the judgment related to Harris' possession of a controlled substance conviction, identified possession of a controlled substance as a "felony." (See Appellant's brief, p. 8 n. 9.) Harris argues, however, that because Exhibits 25 and 26 did not specifically identify the crimes of conviction as felonies, the state was required to introduce the Idaho Statutes related to trafficking in methamphetamine and delivery of methamphetamine in order to establish Harris' prior convictions were felonies. (See Appellant's brief, pp. 7-9.)

Harris' argument fails. Considering the evidence in the light most favorable to the prosecution, the state presented substantial competent evidence from which a reasonable jury could determine that Harris' prior Idaho convictions for trafficking and delivery of methamphetamine were felony convictions.

B. Standard Of Review

"A jury's finding that a defendant is a persistent violator will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its

burden of proving the essential elements of the enhancement beyond a reasonable doubt.” State v. McClain, 154 Idaho 742, 748, 302 P.3d 367, 373 (Ct. App. 2012) (citing State v. Marsh, 153 Idaho 360, 365, 283 P.3d 107, 112 (Ct. App. 2011); State v. Herrera–Brito, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); State v. Knutson, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991)). The appellate court does not substitute its view for that of the trier of fact as to the reasonable inferences to be drawn from the evidence. Id. (citing Knutson, 121 Idaho at 104, 822 P.2d at 1001; State v. Decker, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985)). The appellate court also considers the evidence in the light most favorable to the prosecution. Id. (citing Herrera–Brito, 131 Idaho at 385, 957 P.2d at 1101; Knutson, 121 Idaho at 104, 822 P.2d at 1001).

C. The Jury Had Substantial Evidence Upon Which To Determine That Harris’ Prior Convictions Were Felony Convictions

At the persistent violator portion of the trial, the state introduced evidence of Harris’ prior felony convictions. (See 12/16/14 Tr., p. 289, L. 16 – p. 290, L. 13; Ex. 25, 26, and 27.) Exhibits 25 and 26 prove that Harris was convicted of trafficking in methamphetamine in violation of Idaho Code § 37-2732B(a)(3)(A), and of delivery of methamphetamine in violation of Idaho Code § 37-2732(a)(1)(A). (Exs. 25, 26.) Exhibit 27 proves that Harris was convicted of possession of a controlled substance in violation of Idaho Code § 37-2732(c). (Ex. 27.) The jury found Harris was a persistent violator of law. (See 12/16/14 Tr., p. 285, L. 18 – p. 296, L. 9; R., p. 118.)

A persistent violator of the law is defined as “[a]ny person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho.” I.C. § 19-2514. Trafficking in methamphetamine, delivery of methamphetamine and possession of a controlled substance are all felonies under Idaho law. See I.C. §§ 37-2732B(a)(3)(A), 37-2732(a)(1)(A), and 37-2732(c). Thus, by introducing evidence that Harris was previously convicted of trafficking in methamphetamine in violation of Idaho Code § 37-2732B(a)(3)(A), delivery of methamphetamine in violation of Idaho Code § 37-2732(a)(1)(A), and possession of a controlled substance in violation of Idaho Code § 37-2732(c) (see Exs. 25, 26, and 27), the state presented substantial, competent evidence upon which the jury could find that Harris had been previously convicted of three felonies and was therefore a persistent violator of the law.

On appeal, Harris argues that the jury did not have substantial evidence to support its finding that Harris was a persistent violator because the word “felony” does not appear in the judgment and amended complaint regarding the trafficking in methamphetamine and delivery of methamphetamine convictions. (See Appellant’s brief, pp. 8-9; Exs. 25, 26.) Harris concedes the jury had sufficient evidence upon which to find Harris’ Ada County conviction for possession of a controlled substance was a felony, because Exhibit 27 specifically uses the word “felony” to describe the conviction. (Appellant’s brief, p. 8 n. 9; Ex. 27.) Harris claims that, because Exhibits 25 and 26 do not similarly use the word “felony” to describe trafficking in methamphetamine and delivery of

methamphetamine, the state was required to “offer copies of the relevant statutes identifying the crimes of conviction as felonies.” (Appellant’s brief, p. 9 (citing McClain, 154 Idaho at 747-748, 302 P.3d at 372-373; State v. Smith, 116 Idaho 553, 560, 777 P.2d 1226, 1233 (Ct. App. 1989).) McClain and Smith, relied upon by Harris, are distinguishable.

A jury found McClain guilty of felony domestic violence, intimidation of a witness and violation of a no contact order. McClain, 154 Idaho at 744, 302 P.3d at 369. The jury was then asked to determine whether McClain was a persistent violator of the law. Id. The state relied on evidence that McClain had been convicted of possession of a controlled substance in Idaho and of assault in Oregon. Id. “The State’s evidence consisted of certified copies of the judgments of convictions for both offenses and the criminal indictment for the assault charge from Oregon.” Id. However, under Oregon law, assault can be either a misdemeanor or a felony, and the state’s exhibits did not clarify whether McClain was convicted of a felony or a misdemeanor assault. Id. at 748, 302 P.3d at 373.

The State’s Exhibit 63, presented at trial, included the Oregon indictment by which McClain was charged with *first* degree assault with a dangerous weapon as a felony offense and the Oregon judgment of conviction for a different offense, *third* degree assault. The copy of Exhibit 63 included in the record on appeal includes only the indictment—not the judgment—evidently due to an error in preserving the exhibit in the district court. Nevertheless, it is clear from other portions of the record that Exhibit 63 originally included the Oregon judgment for third degree assault and that the judgment did not indicate whether that offense, for which McClain was convicted, was a felony or a misdemeanor. The indictment charging McClain with first degree assault does not mention third degree assault and, hence, does not indicate whether the latter offense was a felony under Oregon law.

Id. (emphasis in original, footnote omitted.) The Idaho Court of Appeals explained that the Oregon judgment did not specify whether third degree assault was a felony in Oregon and therefore the state was required to prove whether that foreign conviction was a felony. Id.

The record plainly demonstrates that the Oregon judgment did not specify whether third degree assault was a felony, and no other evidence in the record answers that question. The State did not introduce copies of the applicable Oregon statutes that could have identified the offense as a misdemeanor or felony. Therefore, the State did not meet its burden of proving that McClain's conviction of third degree assault was for a felony offense.

Id.

Here, contrary to McClain, the state was not trying to prove Harris had a prior felony conviction for a foreign offense; instead the state introduced evidence that Harris was convicted of trafficking in methamphetamine in violation of Idaho Code § 37-2732B(a)(3)(A), and of delivery of methamphetamine in violation of Idaho Code § 37-2732(a)(1)(A). (See Exs. 25, 26.) Notably, in McClain, the state proved that McClain had been convicted of possession of a controlled substance in Idaho by only introducing a certified copy of the Idaho judgment of conviction. See McClain, 154 Idaho at 744, 302 P.3d at 369.

This conclusion is supported by State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982) overruled on other grounds by State v. Pierce, 107 Idaho 96, 99-100, 685 P.2d 837, 840-841 (Ct. App. 1984). In Williams, the state presented copies of four judgments from Washington showing Williams was convicted of “two counts of second degree burglary, one count of delivery of a controlled substance, and one count of second degree possession of stolen

property.” Williams, 103 Idaho at 646, 651 P.2d at 580. “A jury found Williams to be a persistent violator, but the district court subsequently entered an order dismissing the charge because the state’s evidence had failed to show that the prior convictions were for felonies under Washington law.” Id. The Court of Appeals affirmed. Williams, like McClain, required the state to prove whether a foreign conviction was a felony.

The holding in Smith, supra, is likewise in accord that an Idaho certified judgment is sufficient evidence from which to find that the prior conviction was a felony. See Smith, 116 Idaho at 560, 777 P.2d at 1233. Smith argued that “the state failed to prove each element of the persistent violator allegation because it did not wholly eliminate a possibility that the prior crimes were misdemeanors, rather than felonies, when he committed them.” Id. While the state introduced statutes and legislative history, along with evidence that Smith committed the prior crimes, the Idaho Court of Appeals held that the legislative history and statutes were not necessary. Id.

In deciding to charge Smith as a persistent violator, the state was required to ascertain that his prior crimes were indeed felonies when committed. *See generally State v. Williams*, 103 Idaho 635, 647, 651 P.2d 569, 581 (Ct. App. 1982). However, in making a prima facie presentation to the jury, the state did not have the burden, *sua sponte*, of disproving a speculative and unasserted possibility that the statutes had been amended some time after commission of the crimes, changing misdemeanors into felonies. Nor did the state have an initial burden of locating the code books in existence when the prior crimes were committed, and of making copies of the statutes directly from those books, in order to negate such an inchoate possibility.

Id. Rather, the state was only required to produce copies of the judgments that specifically identified the crimes as a felonies. Id.

Here, the state introduced evidence that Harris was previously convicted of trafficking in methamphetamine in violation of Idaho Code § 37-2732B(a)(3)(A) and of delivery of methamphetamine in violation of Idaho Code § 37-2732(a)(1)(A). (See Exs. 25, 26.) This evidence specifically identified the Idaho statutes under which Harris was previously convicted. (See Id.) These crimes are felonies under Idaho law. See I.C. §§ 37-2732B, 37-2732. Unlike McClain and Williams, there was no issue of trying to determine whether a foreign conviction was a felony. The jury, having been presented with a certified judgment showing that Harris was previously convicted of two crimes that are, as a matter of Idaho law, felonies, had sufficient evidence to find Harris guilty of being a persistent violator.

Since Harris filed his opening brief, the Idaho Supreme Court has decided State v. Yermola, __ Idaho __, __ P.3d __, 2016 WL 768105 (Feb. 29, 2016) which supports the state's position in this case. The state charged Yermola with, among other things, willful concealment of a felony offense. Id., 2016 WL 768105, at *1. The jury found Yermola guilty of willful concealment of a felony offense and Yermola appealed. Id. The only issue was whether there was sufficient evidence to convict Yermola of concealing evidence of a felony offense – “specifically whether the State was required to prove that the object concealed was evidence of a criminal offense that was a felony.” Id. at *2. Relying primarily upon State v. Scheminisky, 31 Idaho 504, 174 P. 611 (1918) overruled in part by State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963) and Apprendi v. New Jersey, 530 U.S. 466 (2000), the Idaho Supreme Court held that, in order to

support a conviction for felony willful concealment, the state was required to prove that the crime being investigated was a felony. Id. at *4-5.

The Court held that simply labeling the crime being investigated as “Grand Theft” in the jury instructions did not provide the jury with sufficient evidence to determine whether the crime being investigated was a felony. Id. at *5.

The State argues that the jury instruction setting forth the elements of the crime of grand theft was sufficient evidence that the inquiry or investigation involved a felony criminal offense. That instruction began with the words, “In order for the defendant to be guilty of Grand Theft by Possession of Stolen Property, the state must prove each of the following.” The State contends that labeling the crime as “Grand Theft” provided sufficient evidence that the crime being investigated was a felony criminal offense. The jury instructions are not evidence. Holding that a jury instruction would provide evidence of a crime charged would be no different from holding that the judge, not the jury, could determine an element of the crime.

Id.

Here, contrary to Yermola, the state did not rely upon jury instructions to prove that Harris’ prior convictions were felonies. The state instead relied upon evidence introduced at trial in the form of a certified judgment of conviction and an amended information that specifically identified the Idaho statutes upon which Harris was previously convicted and the penalties for those convictions. (See Exs. 25, 26.) The exhibits identified the statutes as Idaho Code §§ 37-2732B and 37-2732. (Id.) Whether the crimes proscribed by Idaho Code §§ 37-2732B, 37-2732 are felonies is not an issue for a jury to decide; it is a matter established by law. See State v. Lemmons, 158 Idaho 971, 974, 354 P.3d 1186, 1189 (2015) (“The conversion rate was not an issue for the jury to decide. It is a matter established by law. The conversion rate is no more an adjudicatory fact

than are the provisions of a statute.”) Therefore, unlike Yermola, the jury here had evidence of the specific crimes for which Harris was previously convicted.

In addition to identifying the specific statutes that, as a matter of law, support the jury’s finding that the crimes of conviction were felonies, the exhibits provided other details from which a jury could determine that trafficking and delivery of methamphetamine were both felonies. Jurors are allowed to make reasonable inferences regarding the evidence presented to them, and the state is not required to present evidence conforming to the specific wording of the criminal statute. See Lemmons, 158 Idaho at 975, 354 P.3d at 1190; Herrera–Brito, 131 Idaho at 385, 957 P.2d at 1101. The exhibits show that Harris was committed to the “custody of the Idaho State Board of Correction” and was sentenced to 5 years for each count. (Ex. 25.) A rational juror having even a de minimus understanding of the criminal justice system would know that 5-year prison sentences are reserved for felonies. Thus, the evidence showing that Harris was sentenced to 5 years on both the trafficking and delivery counts is evidence from which a jury could determine that trafficking and delivery of methamphetamine are felonies. Further, the jury was specifically informed that mere possession of controlled substance was a felony (see Ex. 27) and therefore a reasonable juror could logically conclude that delivery and/or trafficking of a controlled substance would also be felonies.

Considering the evidence in the light most favorable to the prosecution, the state provided sufficient evidence from which a reasonable jury could determine that Harris’ prior Idaho convictions for trafficking and delivery of

methamphetamine were felony convictions. As a result, the jury had sufficient evidence upon which to find that Harris was previously convicted of two or more felonies and was therefore a persistent violator of the law.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 15th day of April, 2016.

Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of April, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd